

)	
P.G., Appellant)	
)	
and)	Docket No. 07-475
)	Issued: May 8, 2007
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Los Angeles, CA, Employer)	
)	

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 11, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 28, 2006 nonmerit decision denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹ The most recent merit decision of record was the Office's July 12, 2005 decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal on December 11, 2006, the Board lacks jurisdiction to review the merits of this claim. *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On April 5, 2005 appellant, then a 29-year-old customs and border protection officer, filed a traumatic injury claim alleging that he sustained injuries to his left shoulder and left thumb on April 2, 2005, when a passenger backed into him as he entered his booth. In support of his claim, appellant submitted a May 3, 2005 report from Dr. Stephen G. Owens, a Board-certified orthopedic surgeon, who identified appellant's chief complaint as "recurrence of an old injury," which occurred a year and a half earlier. Dr. Owens noted that appellant had pain in the anterior part of his left shoulder with certain movements, especially flexion and abduction. He opined that appellant had aggravated a previously diagnosed acromioclavicular (AC) joint sprain.

On May 16, 2005 the Office informed appellant that the information submitted was insufficient to establish that he was injured in the performance of duty. Noting that he had provided no physician's opinion explaining how his alleged injury resulted in a diagnosed condition, the Office provided appellant 30 days to submit additional evidence in support of his claim.

In response, appellant submitted a statement dated May 18, 2005 describing the immediate effects of his alleged injury. He indicated that he suffered a cut to his left thumb, and soreness to his neck, left shoulder and left arm. Appellant stated that he notified his supervisor immediately after the alleged injury. He submitted a duplicate of Dr. Owens' May 3, 2005 report.

By decision dated June 22, 2005, the Office denied appellant's claim. The Office found that although the evidence established that the claimed incident occurred, there was no medical evidence that provided a diagnosis which could be connected to the established event.

On July 1, 2005 appellant requested reconsideration of his claim. He stated that he originally injured his left shoulder, arm, neck and lower back while training at the Federal Law Enforcement Training Center (FLETC) in Glynco, California. In April 2005, appellant was reinjured at work in a doorway, when he cut his thumb and crushed his left shoulder.

Appellant submitted unsigned notes from Dr. Owens' office covering the period August 6, 2004 through May 3, 2005. Notes dated August 6, 2004 reflected that he was treated for a left shoulder injury that incurred in May 2004 during a training session. Notes dated September 9, 2004 reflected a diagnosis of left shoulder strain. Appellant submitted documents from Dr. Owens dated May 3, 2005, including a request for authorization, and a prescription, for physical therapy of appellant's left shoulder.

By decision dated July 12, 2005, the Office denied modification of its June 22, 2005 decision, on the grounds that appellant had not established a causal relationship between the April 2, 2005 incident and his diagnosed condition. The Office stated that Dr. Owens' report failed to provide a rationalized opinion explaining how the accepted incident had caused or contributed to appellant's left shoulder condition, giving consideration to his underlying, preexisting condition.

The record contains a letter and an appeal request form from appellant, both dated July 5, 2006, requesting reconsideration of the Office's July 12, 2005 decision. Appellant contended that his April 2, 2005 injury aggravated his May 3, 2004 injury. The record contains a copy of the envelope in which appellant's request for reconsideration was received. The envelope was addressed to the Office and was postmarked on July 14, 2006. In support of his request, appellant submitted a May 12, 2004 report bearing an illegible signature from the FLETC health unit, reflecting that appellant was treated on that date for a left shoulder and lower back injury which occurred on May 3, 2004. Appellant also submitted a copy of a CA-1 claim form dated May 12, 2004 (File No. 132105977) alleging that he was injured on May 3, 2004 during a training session. Appellant also submitted a May 17, 2004 authorization for treatment of a lower back injury (with left leg involvement) which occurred on May 3, 2004.

By decision dated September 28, 2006, the Office denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to establish clear evidence of error.²

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁴

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed.⁵ When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error. Office regulation and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth

² On appeal, appellant's representative argues that appellant's request for reconsideration was timely. In support of her contention, the representative submitted a copy of a certified mail receipt postmarked July 6, 2006. As this evidence was not previously considered by the Office prior to its decision of July 12, 2005, it cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record, and whether the new evidence demonstrates clear error on the part of the Office.¹¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹²

ANALYSIS

In its September 28, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. The one-year time limitation begins to run on the date following the date of the Office's decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹³ Therefore, appellant had one year from July 12, 2005 to submit a timely request for reconsideration. The Board notes that Office regulations and Chapter 2.1602.3(b)(1) of the Office's procedure manual provide that timeliness for a reconsideration request is determined by the postmark on the envelope that enclosed the

⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedures further provide: "The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *D.D.*, 58 ECAB ____ (Docket No. 06-1148, issued November 30, 2006; see also *Leon D. Faidley, Jr.*, *supra* note 4).

¹³ *Donna M. Campbell*, 55 ECAB 241 (2004).

request.¹⁴ Appellant's reconsideration request was dated July 5, 2006. However, the envelope which contained his request, a copy of which was retained by the Office, was postmarked July 14, 2006, more than one year after the July 12, 2005 decision. Therefore, the Office properly determined that appellant's application for review was not timely filed, and the Board must address whether appellant has demonstrated clear evidence of error by the Office.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its September 28, 2006 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error. Appellant contended that his April 2, 2005 injury aggravated his May 3, 2004 injury. However, he did not allege, or submit evidence clearly showing, that the Office's determination was improper. Appellant submitted a copy of a CA-1 claim form dated May 12, 2004 (File No. 132105977), alleging that he was injured on May 3, 2004 during a training session; a May 12, 2004 report bearing an illegible signature from the FLETC health unit, reflecting that appellant was treated on that date for a left shoulder and lower back injury which occurred on May 3, 2004; and a May 17, 2004 authorization for treatment of a lower back injury involvement which occurred on May 3, 2004. These documents do not show that the Office erred in denying his reconsideration request. In fact, this evidence is not relevant to the issue that was before the Office when it issued its July 12, 2005 decision. The Office found that the medical evidence of record failed to establish a causal relationship between the April 2, 2005 incident and appellant's diagnosed condition. The evidence submitted by appellant in support of his request for reconsideration does not address that issue, but rather relates to appellant's April 2004 injury. The Board finds that the arguments and evidence submitted by appellant in support of his request for reconsideration do not *prima facie* shift the weight of the evidence in his favor, or raise a substantial question as to the correctness of the Office's July 12, 2005 decision, and are thus insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹⁴ See 20 C.F.R. § 10.607(a). The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 28, 2006 decision is affirmed.

Issued: May 8, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board